

**BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA**

INQUIRY CONCERNING A
JUDGE: GREGORY P. HOLDER
NO.: 02-487

FLORIDA S. COURT
CASE NO.: SC03-1171

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT’S MOTION
AND SUGGESTION TO DISQUALIFY JUDGE JOHN P. KUDER, JUDGE
THOMAS B. FREEMAN, DR. LEONARD HABER, AND MR. RICARDO
MORALES, III, OF THE JUDICIAL QUALIFICATIONS COMMISSION
HEARING PANEL**

I. Summary of Argument

Judge John P. Kuder, Judge Thomas B. Freeman, Dr. Leonard Haber, and Ricardo Morales, III, (collectively, “the previous panelists”) of the Judicial Qualifications Commission Hearing Panel should be disqualified from adjudicating the pending charges against Judge Gregory P. Holder because, in connection with a prior proceeding concerning Judge Holder, they have necessarily formed opinions about his credibility and veracity, which clearly is a material issue in this proceeding. As a result, Holder fears that he will not receive a fair and impartial hearing before the panel. Because the previous panelists’ prior determination would cause a prudent person reasonable fear that he will not receive a fair and impartial hearing, the fact giving rise to the fear is legally sufficient to require disqualification. Moreover, a Hearing Panel that has the appearance of bias

violates the Florida and federal rights to due process of law, which rights the Judicial Qualifications Commission cannot deny to accused judges.

II. Facts

The Judicial Qualifications Commission (JQC) has brought formal charges against Judge Holder alleging that he plagiarized a research paper submitted in January of 1998 to the U.S. Air Force Air War College (AWC). Judge Holder maintains that he did not plagiarize the paper, and those who read his actual paper in 1998 have sworn that the plagiarized paper is not Judge Holder's actual AWC paper.

In his capacity as an Air Force Reserve officer, Judge Holder attended AWC nonresident classes at MacDill Air Force Base during school year 1997–98. In accordance with common practice among AWC students, Colonel E. David Hoard provided a copy of his paper to Judge Holder as an example for the format.¹ Judge Holder received a passing grade on his paper. Years later, however, a plagiarized paper bearing Judge Holder's name purportedly was anonymously delivered to a federal prosecutor. This purported Holder paper repeats verbatim language from Colonel Hoard's AWC paper.

¹ The format was dissimilar to the format commonly used by lawyers and other professionals, and many of Holder's colleagues found it difficult to comply with the AWC format requirement.

A JQC Hearing Panel of six members² is scheduled to adjudicate the charges against Judge Holder. Unfortunately, four of these panelists served on a JQC Investigative Panel that decided to press charges against Judge Holder in an earlier matter. That Investigative Panel, which also consisted of six members, decided by vote of at least five members that probable cause existed to file formal charges against Judge Holder. The notice of formal charges alleged that Judge Holder had provided a “false or misleading answer” on an application for a federal judgeship. The application asked whether Judge Holder had ever been formally disciplined while on the bench. Judge Holder stated that he had not. Under the JQC’s interpretation of the question, however, Judge Holder should have disclosed that he had been privately counseled by members of the JQC and by his superiors at the courthouse. Because the Investigative Panel was unable to determine whether Judge Holder had intended to give a false response, the matter was resolved by entry of stipulations between Judge Holder and the JQC.

In this proceeding, Judge Holder has filed an affidavit under JQC Rule 25 swearing that he fears he will not receive a fair hearing before the JQC Hearing Panel as it is presently constituted. The primary basis of his fear is that four of the six Hearing Panel members necessarily have already formed opinions about Judge

² The members of the panel are Judge John P. Kuder, Judge Thomas B. Freeman, Howard C. Coker, Esq., Perry Odom, Esq., Dr. Leonard Haber, and Ricardo Morales, III.

Holder's credibility and veracity during their investigation of the earlier charges of providing a false or misleading answer.

III. Discussion

Judge John P. Kuder, Judge Thomas B. Freeman, Dr. Leonard Haber, and Ricardo Morales, III, (i.e., the previous panelists) should be disqualified from sitting on the Hearing Panel in this proceeding because they have formed opinions about Judge Holder's credibility and veracity. For that reason, Judge Holder reasonably fears that he will not receive a completely impartial trial before the Hearing Panel as it is presently constituted. In order to justify disqualification under the JQC rules, Judge Holder needs only to allege that he fears he will not receive a fair hearing. Fla. Jud. Qual. Comm'n R. 25. The only lawful inquiry into disqualification is whether the facts are legally sufficient to create a reasonable fear of bias. Because the facts alleged by Judge Holder are legally sufficient to create such a fear, the previous panelists must be disqualified. See Goines v. State, 708 So. 2d 656 (Fla. 4th DCA 1998); see also People v. Corelli, 343 N.Y.S.2d 555 (N.Y. App. Div. 1973). Furthermore, the Canons of Judicial Ethics require that judges disqualify themselves whenever their impartiality may reasonably be questioned. Finally, and most importantly, a fair and impartial Hearing Panel is an essential component of due process, to which a judge is entitled in JQC

proceedings. Florida and federal due process require that a hearing be untainted by even the shadow of bias.

A. The JQC Rules Require Disqualification

A panel member who is the subject of a motion to disqualify under JQC Rule 25 may only evaluate whether the facts alleged in the motion are legally sufficient to require disqualification. See Livingston v. State, 441 So. 2d 1083 (Fla. 1983). Facts are legally sufficient when they create a reasonable fear of bias. E.g. Downs v. Moore, 801 So. 2d 906 (Fla. 2001); Livingston v. State, 441 So. 2d 1083 (Fla. 1983). The judge may not “pass on the truth of the allegations.” Livingston, 441 So. 2d at 1086. If the facts are legally sufficient to mandate disqualification, the judge is disqualified. Therefore, the only question in Judge Holder’s Motion and Suggestion to Disqualify is whether the facts alleged are legally sufficient to require disqualification.

In Goines v. State, the Fourth District Court of Appeal addressed a similar question as that raised by Judge Holder’s Motion and Suggestion to Disqualify. 708 So. 2d 656 (Fla. 4th DCA 1998). The defendant faced drug charges in a case pending before a judge who, as a prosecutor, had previously prosecuted the defendant on other drug charges. Id. Although the defendant was to be tried by a jury, the defendant was charged under the Habitual Felony Offender statute. Id. Thus, at sentencing, the judge would consider the defendant’s previous drug

conviction—a conviction with which he had personal experience. Id. The court held that disqualification was required and that these facts created a reasonable fear that the defendant would not receive a fair trial. Id. at 660.

The court in Goines discussed a New York case, People v. Corelli, 343 N.Y.S.2d 555 (N.Y. App. Div. 1973), cited by the defendant in support of his contention that a judge who previously prosecuted a defendant should be disqualified from presiding over that defendant’s trial. Goines, 708 So. 2d at 658. In Corelli, the judge assigned to preside over the trial had previously prosecuted the defendant on other charges. Corelli, 343 N.Y.S.2d at 556. The defendant had waived his right to trial by jury on usury charges, so the judge would be the sole trier of fact. Id. at 555–56. Had a juror possessed the judge’s experience with the defendant, that juror “would have been subject to exclusion for cause.” Id. at 556. As a result of this prior experience, the court held that disqualification was required. Id.

The Goines court noted that the trial judge was not the trier of facts; the defendant was tried by a jury. Goines, 708 So. 2d 656. However, under the Habitual Felony Offender statute, the trial judge would weigh facts at the defendant’s sentencing. Id. For that reason, the trial judge should have been disqualified under the principles stated in Corelli. Id. Although six years had passed between the trial judge’s earlier prosecution of the defendant and the case

over which the trial judge presided, the court held that this interval was not sufficient to remove the inference of bias. Id.

The Investigative Panel in the prior proceeding concerning Judge Holder decided whether to bring charges and decided what charges to bring. In so doing, the Panel performed a prosecutorial function. For the same reasons as in Goines and Corelli, the previous panelists must be disqualified.

Indeed, the rationale for disqualification of the former Investigative Panel members is even stronger than in Goines for two reasons: (1) the Hearing Panel members will be the sole triers of the facts, and (2) the time between the first case against Judge Holder and the instant case is far less than six years. The judge in Goines was disqualified from hearing the case despite the fact that he would have been the arbiter of only limited facts, which did not include guilt or innocence. In Judge Holder's case, the Hearing Panel members will decide all of the facts, including whether Judge Holder is guilty of the pending charges. Additionally, six years was not long enough to rebut the reasonable inference that a judge who earlier prosecuted a defendant would be biased. Goines, 708 So. 2d at 659. Certainly, the two years that have passed since the Investigative Panel's decision to press formal charges against Judge Holder would not render unreasonable Judge Holder's fear that the panelists might harbor some bias.

B. Holder's Subjective Fear of Bias

For all of the foregoing reasons, Judge Holder harbors a reasonable fear of bias. “The question of disqualification focuses on those matters from which a litigant may reasonably question a judge’s impartiality rather than the judge’s perception of his ability to act fairly and impartially.” Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983); see also State ex rel. Brown v. Dewell, 179 So. 695, 697-98 (Fla. 1938) (“It is not a question of how the judge feels; it is a question of what feeling resides in the affiant’s mind and the basis for such feeling.”). Judge Holder has not asserted that the previous panelists will deliberately preside over an unfair hearing. He does, however, fear that these panelists might bring into the hearing preconceived opinions about his credibility and veracity.

Two years ago, the JQC Investigative Panel on which the previous panelists sat voted to charge Judge Holder with submitting a document to the federal government that contained false or misleading information. Now, the JQC has again charged Judge Holder with essentially the same type of conduct. The decision of the Investigative Panel to formally charge Judge Holder in the prior proceeding arguably could be validated if Judge Holder were later convicted of the pending charges. Judge Holder fears that the previous panelists will be inclined to validate their earlier decision. This possibility argues further in support of disqualification.

Judge Holder's fears are shared by others, as well. Patricia Fields Anderson, an attorney whose practice concentrates on Due Process issues, and the Honorable Jerry Hill, State Attorney for the Tenth Judicial Circuit of Florida, both submitted affidavits in support of Judge Holder's Motion and Suggestion to Disqualify. Anderson believes the previous panelists cannot be fair and impartial in this proceeding, because of their prior experience with Judge Holder. Hill agrees. As the former chairman of the Florida Bar Grievance Committee for the Tenth Judicial Circuit, Hill has a great deal of experience with ethical matters and believes there is reason to fear bias in this situation. For all of these reasons, the previous panelists should be disqualified.

C. Judicial Canon 3E Requires Disqualification

Judicial Canon 3E requires judges to disqualify themselves from proceedings in which their impartiality might reasonably be questioned. Fla. Code Jud. Conduct, Canon 3E. Under such circumstances, disqualification is mandatory. For all of the reasons set forth above, the impartiality of the previous panelists can reasonably be questioned. Indeed, Judge Holder and two other respected attorneys reasonably question the impartiality of the previous panelists. Moreover, the only Florida authority to have considered similar facts has found it reasonable to question a judge's impartiality in an analogous factual situation. Goines, 708 So.

2d 656. Accordingly, Canon 3E requires that the previous panelists disqualify themselves from this proceeding.

D. Florida and Federal Due Process Clauses Require Disqualification

Judge Holder's Florida and federal rights to due process of law require a panel that both is, and appears to be, fair and impartial. As the Goines court noted:

The primary evil in having a judge whose impartiality might reasonably be questioned is not in the actual results of that judge's decision making. Rather it is the intolerable appearance of unfairness that such a circumstance imposes on the system of justice. Public acceptance of judicial decision making turns on popular trust in judges as neutral magistrates. The judicial system fails to present a plausible basis for respect when a judge's impartiality can reasonably be questioned.

Goines v. State, 708 So. 2d 656, 661 (Fla. 4th DCA 1998). The U.S. Supreme Court similarly explained that, "[j]ustice must satisfy the appearance of justice." In re Murchison, 349 U.S. 133, 136 (1955). In fact, it is a violation of due process of law to force Judge Holder to be judged by a panel that even appears biased. See Id. "A fair tribunal is a basic requirement of due process." Id.

An accused judge has the right to due process in a JQC hearing. In re Inquiry Concerning a Judge, J.Q.C. No. 77-16, 357 So. 2d 172 (Fla. 1978). Though a JQC proceeding is not a criminal prosecution, a judge "may not be removed from office unless his constitutional rights are protected." Id. at 181. The Hearing Panel as it is presently constituted would violate Judge Holder's fundamental Florida and federal constitutional rights to due process of law

because, as set forth above, the previous panelists present at least the question or shadow of partiality. See Livingston v. State, 441 So. 2d 1083, 1085–86 (Fla. 1983) (quoting Dickenson v. Parks, 140 So. 459 (Fla. 1932)).³

IV. Conclusion

Judge Holder has alleged that he fears he will not receive a fair and impartial hearing before the Hearing Panel as it is presently constituted. Such an allegation having been made, the role of the Hearing Panel is only to determine whether the

³ The court stated:

Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned.

....

It is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes. The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the law as instrumentalities to work out and arrive at the truth of the controversy.

The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised.

Dickenson v. Parks, 140 So. 459, 462 (Fla. 1932)._

facts alleged are legally sufficient to give a prudent person reasonable fear that he will not receive a fair hearing. Livingston v. State, 441 So. 2d 1083 (Fla. 1983).

The facts giving rise to Judge Holder's fear are legally sufficient to require disqualification. Having served on an Investigative Panel that decided to press formal charges against Judge Holder alleging that he submitted a document to the government that contained false or misleading information, the previous panelists have necessarily formed opinions about Judge Holder's credibility and veracity. These facts are legally sufficient to create a reasonable fear in a prudent person that he will not receive a fair hearing. See Goines v. State, 708 So. 2d 656, 660 (Fla. 4th DCA 1998). Accordingly, the previous panelists must be disqualified.

Failure to disqualify the previous panelists would deny Judge Holder his fundamental and constitutional right to due process of law. A JQC proceeding must afford an accused judge the fundamental right to due process of law. In re Inquiry Concerning a Judge, J.Q.C. No. 77-16, 357 So. 2d 172 (Fla. 1978). Due process of law requires a fair hearing, and it also requires the appearance of fairness and impartiality. In re Murchison, 349 U.S. 133 (1955). A Hearing Panel clearly does not have the appearance of fairness and impartiality if four of its six members have necessarily prejudged Judge Holder's credibility and veracity.

For the foregoing reasons, Judge Holder's Motion and Suggestion to Disqualify Judge John P. Kuder, Judge Thomas B. Freeman, Dr. Leonard Haber,

and Ricardo Morales, III, of the Judicial Qualifications Commission should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the forgoing has been furnished this ____ day of August, 2004, via United States Mail to: Ms. Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; The Honorable John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell Ditmar DeVault Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 333202; and, Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629.

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